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ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 15, 1993

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-3019

UNITED STATES OF AMERICA,

Appellee,

v.

NYNEX CORPORATION,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

NYNEX Corporation ("NYNEX") appeals from a final judgment of the United States District Court for the District of Columbia (H. Greene, J.). The court found NYNEX guilty of criminal contempt of the consent decree entered in the government's antitrust case against AT&T, United States v. Western Elec. Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983),[1] and imposed a fine of one million dollars.

[1]The AT&T decree also is referred to as the "Modification of (continued...)

United States v. NYNEX Corp., No. 90-0238 (Feb. 16, 1993) (J.A. 266). The court's opinion is reported at 814 F. Supp. 133 (D.D.C. 1993) (J.A. 240). The district court had jurisdiction pursuant to the federal criminal contempt statute, 18 U.S.C. §401(3), and section VII of the decree, 552 F. Supp. at 231 (J.A. 478-79). This Court has jurisdiction pursuant to 28 U.S.C. §1291.

ISSUES PRESENTED FOR REVIEW

1. Whether NYNEX had a constitutional right to jury trial in this criminal contempt case, where the government sought and the district court imposed a fine that amounted to less than one-tenth of one percent of NYNEX's average annual net income.

2. Whether the evidence was sufficient to support the district court's findings that a) NYNEX violated the decree, b) the decree's prohibition of the conduct at issue was sufficiently clear, and c) NYNEX's violation was willful.

3. Whether the district court committed any reversible error in a) admitting statements from the deposition testimony of NYNEX employees, offered by the government, as nonhearsay admissions of a party under Fed. R. Evid. 801(d)(2)(D), and b) excluding as hearsay testimony, offered by NYNEX, of a NYNEX employee as to the statements of another NYNEX employee.

4. Whether the section of the United States Department of Justice Antitrust Division that is responsible for all proceedings involving the AT&T decree was barred from prosecuting this case.

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[1](...continued)
Final Judgment" or "MFJ."

STATUTES AND REGULATIONS

The pertinent constitutional provisions and statute are set forth in Addendum A to the Brief for Defendant-Appellant NYNEX.

STATEMENT OF THE CASE

A. Course of Proceedings

NYNEX was indicted on one count of criminal contempt, 18 U.S.C. §401(3). The indictment (J.A. 16-21) charged that NYNEX willfully violated section II(D)(1) of the AT&T consent decree, which prohibits the Bell Operating Companies ("BOCs") from providing "information services," as defined in section IV(J) of the decree. Specifically, the indictment charged that, from the time NYNEX acquired Telco Research Inc. ("Telco") on April 11, 1986, until February 1987, NYNEX, through Telco, provided to MCI Communications Corporation ("MCI"), a service that "offered the capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, and making available information via telecommunications." Indictment ¶9 (J.A. 20).

The United States sought a fine of one million dollars. Applying Muniz v. Hoffman, 422 U.S. 454 (1975), the district court denied NYNEX's motion for a jury trial, finding that the proposed fine would amount to less than one-tenth of one percent of NYNEX's average annual net income (over one billion dollars), and "is simply not serious" but "petty relative to NYNEX's significant resources." United States v. NYNEX Corp., 781 F. Supp. 19, 26-28 (D.D.C. 1991) (J.A. 63, 78-84).

The case was tried to the court in April 1992. On February 16, 1993, the court entered judgment finding NYNEX guilty of criminal contempt and imposing a fine of one million dollars. (J.A. 266).

The district court's opinion, 814 F. Supp. 133 (J.A. 240-65), set forth the court's findings of fact and conclusions of law. The court found that the government had proved beyond a reasonable doubt each of the elements of criminal contempt: "(1) a clear and specific court decree existed; (2) NYNEX had knowledge of that decree; (3) NYNEX violated the decree; and (4) NYNEX's violation was willful." 814 F. Supp. at 142 (J.A. 263). The court emphasized that "key NYNEX managers" not only should have known but "clearly knew" that NYNEX was violating the decree, 814 F. Supp. at 139-140 (J.A. 254-58), and that NYNEX's "failure to comply resulted from NYNEX's deliberate or reckless disregard of its affirmative obligations under the decree," 814 F. Supp. at 141-142 (J.A. 262-63). The court also specifically considered and rejected NYNEX's defenses. 814 F. Supp. at 136-38 (J.A. 246-53).

NYNEX filed a notice of appeal on February 26, 1993 (J.A. 37 267).

B. Statement of Facts

1. The Decree Prohibition on Information Services

The AT&T antitrust consent decree, 552 F. Supp. at 226-34 (J.A. 274-82), entered in 1982, required divestiture of the Bell Operating Companies ("BOCs") from AT&T. The decree also prohibited the divested BOCs from providing "information services" and engaging in other businesses "directly or through any affiliated enterprise."[2] Section IV(J) of the decree, 552 F. Supp. at 229 (J.A. 477), defines "information service" as:

[2]The information services restriction was eliminated in 1991. United States v. Western Elec. Co., 767 F. Supp. 308 (D.D.C. 1991), aff'd, No. 91-5263 (D.C. Cir., May 28, 1993).

> the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications. . . .

NYNEX, a Delaware corporation, is one of the Regional Holding Companies created at divestiture. NYNEX and its subsidiaries are "BOCs" as defined in section IV(C) of the decree, 552 F. Supp. at 228 (J.A. 476); see United States v. Western Elec. Co., 797 F.2d 1082, 1087-89 (D.C. Cir. 1986).

2. The Decree Violation

The relevant facts are set forth in the district court's opinion. 814 F. Supp. 133 (J.A. 240). In April 1986, NYNEX acquired Telco, a Tennessee corporation engaged in the business of developing, marketing and servicing telecommunications management software and providing related services. At the time, Telco was providing to MCI, under a November 1985 contract, GX 3 (J.A. 487), an interactive remote-access data processing service -- the "MCI service bureau"[3] -- that MCI used in designing long distance networks for its customers. 814 F. Supp. at 136 (J.A. 244-45). As the district court found, the MCI service bureau was an information service, "a package of services" that offered Telco's customer, MCI, "`a capacity for generating, acquiring, storing, transforming, processing, retrieving, [and] making available information'" in Telco's computers, over telephone lines, i.e., "`via telecommunications.'" 814 F. Supp. at 138 (J.A. 251-52).

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[3]NYNEX and Telco employees, see, e.g., GX 54 (J.A. 525), as well as the district court, 814 F. Supp. at 136 (J.A. 244-46), used the term "service bureau." NYNEX's Brief refers to it as the "MCI arrangement."

To provide this information service to MCI, Telco used computer equipment (primarily a DEC MicroVAX II minicomputer) and associated facilities, owned by Telco and located at Telco's premises in Nashville, Tennessee. Telco loaded MCI's data, which MCI mailed to it on computer tapes, into Telco's computers; performed any format conversion necessary so that MCI could use the data with Telco network design software; and stored the data in Telco's computers. MCI employees then accessed and used the service over telephone lines, with Telco employees' assistance, to generate and refine MCI's network designs. Telco printed the resulting designs and mailed them to MCI or MCI retrieved them by telephone. 814 F. Supp. at 136 (J.A. 245-46). As part of the

MCI service bureau, Telco employees controlled and operated the Telco computer equipment and advised and assisted the MCI employees who used the service. 814 F. Supp. at 138 (J.A. 251). Telco also controlled MCI's access to and use of the computer facilities, and MCI's use of the service bureau was limited to using the Telco programs. 814 F. Supp. at 136-38 (J.A. 246-53).

Key NYNEX managers were aware of the MCI service bureau before the acquisition and not only should have known but knew that continued operation of this information service after NYNEX acquired Telco violated the decree. 814 F. Supp. at 139-40 (J.A. 254-58). Nonetheless, NYNEX continued to provide the MCI service bureau without interruption for over 10 months after it acquired Telco. Indeed, Telco expanded the service shortly after the acquisition, GX 9 (J.A. 517), and renewed the contract in October 1986, GX 7 (J.A. 511). See 814 F. Supp. at 136 n.8 (J.A. 245).

Gad Selig, vice-president for business development at NYNEX Development Company ("DEVCO," a wholly-owned NYNEX subsidiary responsible for the Telco acquisition) and a director of Telco, was one of the NYNEX officials who knew that the MCI service bureau violated the decree. He admitted that as soon as he learned that "on-line services," i.e., data processing services provided over telephone lines, were involved, "that was sufficient for [him] to say [NYNEX] can't do those things" under the decree. 814 F. Supp. at 139 (J.A. 255).

Thomas Hearity, a NYNEX attorney responsible for decree matters, and Victor Cunningham, DEVCO's director of business development, also knew that the MCI service bureau violated the decree. Hearity admitted that he knew NYNEX was "sailing too close to the

wind" by providing the MCI service bureau. 814 F. Supp. at 139 (J.A. 256). Hearity also admitted that he was aware that "if Telco had been the owner of [the] computer" used to provide the MCI service bureau -- and Telco was the owner -- "then Telco would have been providing an information service." 814 F. Supp. at 139 (J.A. 256). In addition, Hearity informed both Selig and Cunningham that the MCI service bureau was an information service and illegal under the decree, and Cunningham so informed other NYNEX and Telco employees. 814 F. Supp. at 139-40 (J.A. 257). While Selig, Hearity and Cunningham knew that NYNEX was violating the decree, NYNEX "had strong economic motives not to discontinue the MCI service bureau," and the continuing violation was not inadvertent. 814 F. Supp. at 140-141 (J.A. 260). Hearity, Selig, Cunningham and others discussed possible modifications of the MCI service bureau, and they were repeatedly put on notice that it had not been modified or terminated. But at no time did any of them take affirmative steps to bring Telco into compliance with the decree. 814 F. Supp. at 140-41 (J.A. 260-61). Moreover, "Cunningham actively maneuvered to avoid ending the service bureau," at times concealing relevant facts from Hearity. 814 F. Supp. at 141 (J.A. 261). In short, "while NYNEX employees continued to discuss the potential violation, this produced only delay, not a remedy." 814 F. Supp. at 141 (J.A. 260-61). As a result of its managers' disregard of clear decree obligations, NYNEX continued to provide the illegal information service until it received a letter from the Department of Justice requesting information in connection with its investigation of the decree violation. See GX 99 (J.A. 537).

SUMMARY OF ARGUMENT

1. NYNEX was not entitled to a jury trial. Under Muniz v. Hoffman, 422 U.S. 454 (1975), there is no fixed dollar limitation on the fine a court constitutionally may impose on a corporation that has been denied a jury trial in a criminal contempt case. Rather, the court must consider the contemnor's resources in order to determine whether the "magnitude of the deprivation" resulting from the fine is so substantial that it invokes whatever constitutional right to jury trial a corporation may have in criminal contempt proceedings. For a corporation with NYNEX's assets and revenues, a fine of one million dollars is not a substantial deprivation.

2. The evidence amply supports the district court's finding that NYNEX was guilty of criminal contempt.

a. The decree prohibited the MCI service bureau. This remote-access data processing service fell squarely within the decree definition of "information service." Because the MCI service bureau was not the provision of customer premises equipment ("CPE") and software, section VIII(A) of the decree and NYNEX's software waiver did not permit it.

b. The decree was clear. Its language and history were not ambiguous as applied to the MCI service bureau. The evidence that NYNEX managers knew that this information service violated the decree further supports the district court's finding that the decree gave NYNEX ample notice that the conduct at issue in this case was prohibited.

c. NYNEX's failure to comply with the decree was willful, i.e., it resulted from NYNEX managers' deliberate or reckless disregard

of their decree obligations. The evidence supports the district court's findings that Selig, Cunningham and Hearity knew or should have known that the MCI service bureau violated the decree, that they knew it had not been terminated or modified, and that they made "a conscious choice not to comply" with the decree rather than terminate a profitable service. 814 F. Supp. at 140 (J.A. 260).

3. The district court's evidentiary rulings were within its discretion.

a. The district court properly admitted statements offered by the government from the deposition testimony of NYNEX managers, as nonhearsay party admissions under Fed. R. Evid. 801(d)(2)(D). Rule 801(d)(2)(D) does not require that the declarant be unavailable, and the Confrontation Clause does not bar admission of a party's own statements against it. Moreover, NYNEX counsel had the opportunity to cross-examine the declarants at their depositions and could have called them for further cross-examination at trial under Fed. R. Evid. 806.

b. The district court did not abuse its discretion in sustaining a hearsay objection to testimony, offered by NYNEX, of Gerald Murray, a NYNEX in-house attorney, as to statements Thomas Hearity, also a NYNEX attorney, made to Murray. NYNEX did not show that the testimony was admissible under Fed. R. Evid. 801(c) or 803(3). Further, Hearity's own deposition testimony concerning his conversations with Murray was in evidence, NYNEX declined the court's suggestion that it call Hearity as a witness at trial, and NYNEX's offer of proof indicated that the excluded testimony would have been of little, if any, probative value.

4. Finally, NYNEX's contention that the case must be remanded and the indictment dismissed because the section of the Department of Justice Antitrust Division responsible for prosecuting this case also was engaged in other matters arising under the AT&T decree is frivolous. The attorneys who conducted and supervised this prosecution were authorized by applicable statutes and regulations to do so, and the Division's other responsibilities in connection with this decree created no "conflict" that could have tainted their conduct.

ARGUMENT

I. NYNEX WAS NOT ENTITLED TO A JURY TRIAL

The district court correctly interpreted and applied Muniz v. Hoffman, 422 U.S. 454 (1975), and held that a fine amounting to only "one-tenth of one percent of NYNEX's average annual net income of over $1 billion" was "petty" rather than "serious" and did not entitle NYNEX to a jury trial. 781 F. Supp. at 26-28 (J.A. 78-84); 814 F. Supp. at 142 (J.A. 264). NYNEX does not challenge the district court's finding that this one million dollar fine "would barely scratch the surface of NYNEX's considerable financial resources." 781 F. Supp. at 26-28 (J.A. 78-84); 814 F. Supp. at 142 (J.A. 264-65). Rather, it contends (Br. at 9-16) that it was "deprived of its constitutional right to a jury trial" because, as a matter of law, the statutory definition of "petty offense," 18 U.S.C. §19, sets a $10,000 limitation on the fine that can constitutionally be imposed on a corporation denied a jury trial in a criminal contempt case. This contention is squarely refuted by the Supreme Court's decision in Muniz. The statutory definition of "petty offense" is not controlling,

and a corporate contemnor is not constitutionally entitled to a jury trial merely because the fine imposed on it exceeds $10,000 or any other specific dollar threshold.

In Muniz, the Supreme Court addressed, for the first time, "the question whether and in what circumstances, if at all, the imposition of a fine for criminal contempt, unaccompanied by imprisonment, may require a jury trial if demanded by the defendant." 422 U.S. at 476. The lower court had denied a motion for jury trial and imposed a $10,000 fine on an unincorporated union found guilty of criminal contempt.

The Court pointed out that it had been "the historic rule that state and federal courts have the constitutional power to punish any criminal contempt without a jury trial." 422 U.S. at 475. See also United States v. Barnett, 376 U.S. 681, 692-700 (1964); Green v. United States, 356 U.S. 165, 183 & n.14 (1958); id. at 192 & n.3 (Frankfurter, J., concurring); In re Debs, 158 U.S. 564, 594-95 (1895). It then summarized the constitutional doctrine that had emerged from more recent cases modifying the traditionally unlimited powers of courts in contempt cases:

> (1) Like other minor crimes, "petty" contempts may be tried without a jury, but contemnors in serious contempt cases in the federal system have a Sixth Amendment right to a jury trial; (2) criminal contempt, in and of itself and without regard to the punishment imposed, is not a serious offense absent legislative declaration to the contrary; (3) lacking legislative authorization of more serious punishment, a sentence of as much as six months in prison, plus normal periods of probation, may be imposed without a jury trial; (4) but imprisonment for longer than six months is constitutionally impermissible unless the contemnor has been given the opportunity for a jury trial.

Muniz, 422 U.S. at 475-76.

The Court next considered the union's argument that because 18 U.S.C. §1(3) defined "petty offenses," as crimes "`the penalty

for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both,'" denial of a jury trial where a contempt fine greater than $500 was imposed deprived it of its Sixth Amendment rights. 422 U.S. at 476-477. The Court rejected that argument and upheld the fine.

The Court noted that, in holding that "imprisonment for longer than six months is constitutionally impermissible unless the contemnor has been given the opportunity for a jury trial," it had "referred to" the definition of petty offense in 18 U.S.C. §1(3). 422 U.S. at 476. But the Court emphasized that "in referring to that definition, the Court accorded it no talismanic significance." Id. at 477. Rather, it had based its holding on the conclusion -- informed but not controlled by 18 U.S.C. §1(3) and other statutes -- that "six months in jail is a serious matter for any individual." Id. (emphasis added). The Court also explained that "[f]rom the standpoint of determining the seriousness of the risk and the extent of the possible deprivation faced by a contemnor, imprisonment and fines are intrinsically different." Id. Fines imposed on an organization do not involve the deprivations of personal liberty that led the Court to recognize a jury trial right for individual contemnors imprisoned for more than six months. See Bloom v. Illinois, 391 U.S. 194, 202 (1968); Duncan v. Louisiana, 391 U.S. 145, 156 (1968); Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966); Barnett, 376 U.S. at 695 n.12.[4] Further, whether a fine -- as opposed to imprisonment -- will constitute a serious deprivation

[4]Even for individuals, a fine or other penalty "cannot approximate in severity the loss of liberty that a prison term entails." Blanton v. North Las Vegas, 489 U.S. 538, 542 (1989).

depends on the contemnor's resources; "it is not tenable to argue that the possibility of a $501 fine would be considered a serious risk to a large corporation or labor union." Muniz, 422 U.S. at 477. Accordingly, the Court concluded, the Sixth Amendment does not prohibit courts in nonjury cases from imposing fines on corporate contemnors that exceed the dollar amount used in the statutory definition of petty offense. 422 U.S. at 476-77.

In so holding, the Court did not suggest that the Sixth Amendment requires any other uniform dollar limitation on corporate contempt fines. Rather, the Court found it appropriate to assess the potential seriousness of the contempt fine imposed on an organization by taking into account the contemnor's size and resources. The Court concluded that for a union that "collects dues from some 13,000 persons," a $10,000 fine, while "not insubstantial . . . is not of such magnitude that the union was deprived of whatever right to jury trial it might have under the Sixth Amendment." 422 U.S. at 477 (emphasis added).[5]

Muniz remains controlling in determining whether a criminal contempt fine could deprive a corporation of whatever

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[5]Thus, the Court did not reach the United States' contention that contempt is not a serious offense unless punished by imprisonment for more than six months and that "there is no constitutional right to a jury trial in any criminal contempt case where only a fine is imposed on a corporation or labor union." 422 U.S. at 477. In arguing to the district court that NYNEX was not entitled to a jury trial in this case, the United States reiterated this position. See Memorandum of the United States in Support of Its Motion for Bench Trial at 2 n.1 (July 20, 1990). Because the district court found the fine imposed on NYNEX permissible under Muniz, however, it also did not reach this alternative argument, and this Court need not do so in order to affirm the judgment and fine in this case. Nor is it necessary for this Court to address NYNEX's arguments (Br. at 10-11) concerning corporations' common law rights to jury trial in other types of criminal cases.

constitutional right to jury trial it may have. NYNEX's suggestion (Br. at 14) that the Muniz Court's rejection of an absolute dollar limitation based on the statutory definition of petty offense turned on the fact that the statutory amount at the time of that decision was only $500 rather than some higher amount, such as $10,000, is plainly wrong. Under Muniz, as this Court has recognized, the statutory definition of petty offense is not controlling, and, for a corporation or an organization, a fine of $10,000 is not necessarily "serious." See Douglass v. First Nat'l Realty Corp., 543 F.2d 894, 902 (D.C. Cir. 1976) (distinguishing individuals from corporations and limiting contempt fines for individuals "in the exercise of [the Court's] supervisory authority").

Further, the Supreme Court's holding that the $10,000 fine imposed in Muniz was constitutional necessarily refutes NYNEX's contention that it was unconstitutional for the district court to fine NYNEX more than $10,000 in this case. The value of the dollar has decreased since 1975, and NYNEX's resources are by any measure much greater than those of the union contemnor in Muniz. It is no more tenable to argue that the possibility of a $10,001 fine, in itself, would be a serious risk to NYNEX than to argue that a $501 fine would have presented such a risk to the union in Muniz.[6]

Congress has created statutory rights to jury trial for some types of criminal contempt cases. 18 U.S.C. §3691 (contempts

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[6] See also Cheff, 384 U.S. at 375 (Court refused to review the $100,000 criminal contempt fine imposed on Holland Furnance Co. but did review the claim of its president, Cheff, that a jury was constitutionally required before he could be imprisoned for six months for contempt).

that also constitute federal criminal offenses); 18 U.S.C. §3692 (contempts in labor dispute cases); see also Fed. R. Crim. P. 42. But no statutory right is at issue here. When Congress amended the 18 U.S.C. §1(3) definition of petty offense in 1984, to increase the $500 amount to $5,000 for individuals and $10,000 for corporations, its objectives were simply "to account for inflation" and to increase the maximum fine level for a variety of offenses in order to make fines a more severe and effective sanction for criminal conduct. H.R. Rep. No. 906, 98th Cong., 2d Sess. 1, 19 (1984). Congress recognized that "[i]n the interests of uniformity, objectivity, and practical judicial administration," the courts in many cases have "looked to 18 U.S.C. 1 as the monetary measure of serious offense for the purposes of the right to jury trial." Id. at 19 (quotation omitted). But it also recognized that "the $500 amount presently used in 18 U.S.C. 1 is not constitutionally mandated and has no other special significance." Id. Congress did not specifically discuss contempt, much less express a national consensus on the maximum fine a court may impose on a corporation for that unique offense without making it a "serious" offense for purposes of the constitutional right to jury trial. In this context, there is absolutely no basis for NYNEX's contention that the 1984 amendment of 18 U.S.C. §1(3) reduced the fines that courts constitutionally could impose on corporate contemnors and that it stripped the courts of their authority to impose fines exceeding $10,000 that would be permissible under Muniz.

Similarly, when Congress enacted 18 U.S.C. §19 in 1987, "to carry forward the current definition of `petty offense,'" it

recognized that "[t]he Supreme Court has indicated that 18 U.S.C. 1 is a measure of the seriousness of an offense for purposes of the right to trial by jury." H.R. Rep. No. 390, 100th Cong. 1st Sess. 4-5 (1987). But Congress did not suggest any intention or understanding that the statutory petty offense definition had displaced the Muniz rule and placed an absolute limit on corporate fines in contempt cases tried without juries. Thus the statutory amendments on which NYNEX relies provide no basis for this Court to depart from the Muniz approach to assessing fines or the Muniz holding that the fine imposed in that case was constitutional. Like its predecessors, 18 U.S.C. §19 has "no talismanic significance" and does not establish a $10,000 constitutional limitation on corporate contempt fines in nonjury cases.[7]

Only two circuits have addressed in post-Muniz decisions the question of the constitutional limits on corporate contempt fines. Neither has found the statutory definition of petty offense to be controlling. The Fourth Circuit has held that, under Muniz, "notwithstanding the denial of a jury trial," a court is limited in imposing a fine on a corporation convicted of

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[7]The state statutes and decisions NYNEX cites (Br. at 14-15 and Addendum B) similarly do not show a national consensus inconsistent with Muniz as to maximum fines for corporate contemnors denied jury trials. To the contrary, it appears from our review that fewer than half the cited cases involve contempt; most of those deal only with jury trial rights of individuals facing imprisonment; and in the only post-Muniz case dealing with a fine imposed on an organizational contemnor, the Supreme Court of Kentucky specifically adopted the Muniz rule and held that a $10,000 contempt fine imposed on a union that had been denied a jury trial was "petty," Int'l Ass'n of Firefighters, Local 526 v. Lexington, 555 S.W.2d 258 (Ky. 1977). The cited statutes prescribe fines and sentences for various categories of offenses, but none of them appears to refer specifically to contempt.

criminal contempt "only to the extent that it is of such magnitude as to constitute a serious deprivation." United States v. Troxler Hosiery Co., 681 F.2d 934, 937 (4th Cir. 1982). That court thus imposed an $80,000 fine on a corporation with a net worth of $540,000. Id. at 938, 937 n.3. A fine of that magnitude was appropriate "not only [to] punish [the corporation] for its conduct, but [to] deter others from such willful disobedience." Id. at 938. Nonetheless, the fine was not so large as to require a jury trial.

The Second Circuit, in United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 665 (2d Cir. 1989), cert. denied, 493 U.S. 1021 (1990), properly held that "the statutory definition [18 U.S.C. §19] does not become talismanic just because the statutory petty offense line has been raised from $500 to $10,000." It went on to hold that while, for fines below $100,000, "it will remain appropriate to consider whether the fine has such a significant financial impact upon a particular organization as to indicate that the punishment is for a serious offense, requiring a jury trial," "a jury right is available for criminal contempt whenever the fine imposed on an organization exceeds $100,000." Id. As the Second Circuit recognized, however, the $100,000 limitation it imposed was "arbitrary," id. at 664, and it did not explain why, without regard to a corporate contemnor's resources, it thought that the distinction between a fine of $99,999 and a fine of $100,001 should have constitutional significance. More importantly, a fixed dollar limitation on corporate contempt fines departs from the Supreme Court's

reasoning in Muniz, and the Second Circuit cited nothing in Muniz or any other Supreme Court decision to support it.[8]

In sum, the Supreme Court's decision in Muniz controls this case. The district court properly exercised its discretion in concluding that a one million dollar fine was sufficiently large that "the offender and others will notice its imposition and will take it into account when considering future violations," but that it was not "serious" because it "would barely scratch the surface of NYNEX's considerable financial resources." 814 F. Supp. at 142 (J.A. 264-65). NYNEX does not contend that the district court erred in assessing the financial impact of this fine on NYNEX.[9] The fine was constitutional because it did not constitute a substantial deprivation for NYNEX.

Even if this Court were to conclude, however, that a fine of one million dollars may not constitutionally be imposed on a corporation of NYNEX's resources without a jury trial, it should not reverse the conviction and remand for a jury trial as NYNEX (Br. at 33) suggests. This Court "ha[s] the authority to revise contempt sentences" itself, and, at most, should "adjust the fine downward" so as not to exceed whatever it concludes is the

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[8]In Musidor, B.V. v. Great American Screen, 658 F.2d 60, 66 (2d Cir. 1981), cert. denied, 455 U.S. 944 (1982), the Second Circuit had held that under Muniz, a fine of $10,000, fifteen percent of the contemnor's gross revenues from illicit sales, did not deprive a corporate defendant of its right to a jury trial. The court in Fox sought to distinguish this earlier, and we submit correct, holding on the ground that the defendant in Musidor had not sought a jury trial.

[9]Cf. United States v. Greyhound Corp., 508 F.2d 529, 541 (7th Cir. 1974) (court of appeals noted that "great reliance must be placed upon the discretion of the trial judge" in setting contempt fine and found no abuse of discretion in $600,000 fine imposed on corporate contemnor after bench trial).

permissible maximum and should "affirm the District Court's judgment as thus modified." Douglass, 543 F.2d at 903; see also Fox, 882 F.2d at 665 (court of appeals vacated fine and remanded case for further proceedings).

II. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE DISTRICT COURT'S FINDINGS THAT NYNEX HAD WILLFULLY VIOLATED A CLEAR AND UNAMBIGUOUS DECREE PROHIBITION AND WAS GUILTY OF CRIMINAL CONTEMPT

NYNEX argues (Br. at 18-24) that "the evidence was insufficient to prove beyond a reasonable doubt that the decree was unambiguous and that it prohibited the arrangement in question." NYNEX also argues (Br. at 24-28) that the district court's findings that NYNEX knowingly and willfully violated the decree "were, on the entire record, clearly erroneous." NYNEX's dissatisfaction with the district court's assessment of the evidence provides no basis for reversal.

This Court "accord[s] a guilty verdict great deference"; the "sole evidentiary issue" on appeal is "whether substantial evidence supports the verdict." United States v. Thomas, 864 F.2d 188, 191 (D.C. Cir. 1988). In a case tried to the court without a jury, this Court applies "the same rule it applies in reviewing criminal jury cases"; the conviction must be affirmed unless "it is clear that upon the evidence a reasonable mind could not find guilt beyond a reasonable doubt." Jackson v. United States, 353 F.2d 862, 864 (D.C. Cir. 1965) (internal quotation and citations omitted); Thomas, 864 F.2d at 191.[10]

[10] See also 2 Charles A. Wright, Federal Practice & Procedure §374 (2d ed. 1982); 3 Charles A. Wright, Federal Practice & Procedure §715 (2d ed. 1982).

(continued...)

Thus, the Court will "view the evidence in the light most favorable to the government, allowing the government the benefit of all reasonable inferences that may be drawn from the evidence, and permitting the [factfinder] to determine the weight and credibility of the evidence." Thomas, 864 F.2d at 191. This Court's "review of the record must . . . accord great weight to the factfinder's role, while providing no incentive for the parties to retry the case on appeal." Id. (citations and internal quotations omitted).

A. NYNEX Violated the Decree

NYNEX concedes (Br. at 20) that the decree prohibited it from providing any "information service," directly or through Telco, its subsidiary. The district court found that the MCI service bureau "falls squarely within the [decree] definition of an information service," i.e., that Telco "offer[ed] a capacity for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications." 814 F. Supp. at 137-38 (J.A. 249-51). NYNEX (see Br. at 23) does not directly challenge that finding. Rather, it contends (Br. at 24) that the MCI service

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[10](...continued)
The "clearly erroneous" standard applies only to "judge-made findings in criminal cases . . . where the judge sits and decides matters which traditionally or by statute have been allocated to him." Jackson, 353 F.2d at 864 (finding that informant was reliable); see also Campbell v. United States, 373 U.S. 487, 493 (1963) (finding that a report was a copy of interview notes and therefore a statement under the Jencks Act); Maine v. Taylor, 477 U.S. 131, 145 (1986) (factual question bearing on whether criminal statute unconstitutionally discriminated against interstate commerce). Even under the clearly erroneous standard: "As [the Supreme] Court frequently has emphasized, appellate courts are not to decide factual questions de novo, reversing any findings they would have made differently." Maine v. Taylor, 477 U.S. at 145.

bureau was permitted under section VIII(A) of the decree, 552 F. Supp. at 231 (J.A. 479), which allows the BOCs to "provide, but not manufacture, CPE" (CPE includes computer equipment), and a "waiver" order that allows NYNEX to "provide software," GX 2 (J.A. 483). Contrary to NYNEX's contentions, the district court properly construed the decree in holding that section VIII(A) and the software waiver do not permit the BOCs to provide information services,[11] and the evidence supports the district court's finding that NYNEX was providing an information service and not engaging in activities permitted under section VIII(A) and the software waiver. 814 F. Supp. at 136-38 (J.A. 246-53).

As the district court recognized, the contention that, when the parties and the court agreed to allow the BOCs to provide CPE and software, they allowed the BOCs to provide any information services in which computers and software are used is untenable. It finds no support in the decree language or history, and it "would make the information services provision a nullity," 814 F. Supp. at 138 (J.A. 252) -- a result clearly contrary to the expressed intent and understanding of the parties and the court.

Section VIII(A) was added to the decree at the court's instance only to modify section II(D)(2)'s prohibition on BOCs' manufacturing or providing CPE. See 552 F. Supp. at 191-93, 225, 231 (J.A. 479). There is no indication that the court or the parties intended section VIII(A) to modify the section II(D)(1) prohibition on BOCs' providing interexchange services and

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[11]Interpretation of the decree is a question of law subject to de novo review by this Court. See, e.g., United States v. Western Elec. Co., 907 F.2d 160, 164 (1990), cert. denied, 111 S. Ct. 1018 (1991).

information services. The software waiver order, GX 2 (J.A. 483), allows NYNEX to provide software, but it also does not modify the information service prohibition. To the contrary, it expressly prohibits "the provision to customers of computer processing capacity." GX 2 (J.A. 483). Moreover, the Department of Justice explained, in a filing on an identical software waiver proposed for another BOC before the NYNEX waiver, that this restriction was intended to make very clear that the software waivers would not allow the BOCs to provide information services. See DX 1011 at 5-6 (J.A. 609-10). NYNEX expressed no contrary view at the time it sought the Department's consent to and the court's approval of its software waiver.

The information service at issue in this case was provided using computer equipment and software, as is typical of information services. But the evidence supports the court's factual findings that the MCI service bureau was an information service and that it was not merely the provision of CPE and software. As the court found, all of the Telco equipment and software used in the MCI service bureau remained under Telco's ownership, possession and control. Moreover, Telco was not merely allowing MCI to use the Telco computer equipment and software, it was providing a "package of services" in which NYNEX "made available Telco Research employees to control, operate, and provide all the equipment function as needed on a daily basis and to advise and assist MCI employees in their dial-in use of the service bureau." 814 F. Supp. at 137-38 (J.A. 249-52).

NYNEX (Br. at 22) challenges the district court's finding that "MCI did not have exclusive control, either physical or

constructive, over the MicroVAX." 814 F. Supp. at 137 (J.A. 248-49). But there was ample evidence to support that finding. As the Telco-MCI contracts, GX 3, 9 (J.A. 487, 517), and the testimony of Telco and MCI employees, see Tr. 69-88, 113-14, 226-27, 243-254 (J.A. 125-44, 148-49, 159-60, 162-73);[12] see also DX 35 at 2 (J.A. 545), showed, Telco managed the system, controlled MCI's access to it, and limited MCI's use of the Telco computers to running specified Telco software. 814 F. Supp. at 137 (J.A. 248-49).

Moreover, in rejecting NYNEX's "CPE plus software" argument, the court viewed Telco's ownership and control of the MicroVAX computer and the absence of any sale or lease of equipment to MCI[13] as significant -- but not the only important -- facts. In addition, the court properly took into account Telco's extensive involvement in and control of MCI's use of both the MicroVAX and other Telco computer equipment and software, i.e., Telco's "active and interactive" role. 814 F. Supp. at 137-38 (J.A. 249-50). As the court emphasized, the MicroVAX computer and Telco's software "were only two of many pieces of the integrated service bureau available to MCI." 814 F. Supp. at 138 (J.A. 251-52).

B. The Decree Was Clear

NYNEX also argues (Br. at 24) that it was not guilty of criminal contempt because "as a matter of law . . . the information

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[12]"Tr." refers to the transcript of the trial (April 6-9, 1992).

[13]The decree does not define the term "provide," but the district court's conclusion that it refers to sale or lease, 814 F. Supp. at 136 (J.A. 247), is consistent with common usage. Moreover, even if the definition of "provide" could be somewhat broader where only equipment is involved, "providing CPE" does not cover the "package of services" at issue here.

service and CPE provisions of the decree are irreconcilably ambiguous as applied to the MCI arrangement." The purpose of the "clear and specific decree" element of the offense of criminal contempt is to ensure that the defendant had fair notice or warning that the decree prohibited the conduct giving rise to the contempt charge. Common Cause v. Nuclear Regulatory Comm'n, 674 F.2d 921, 927 (D.C. Cir. 1982); United States v. Christie Industries, Inc., 465 F.2d 1002, 1006 (3d Cir. 1972). Thus, whether a decree meets this requirement is a question of fact that depends in part on the context in which it was entered and the audience to which it is addressed. Matter of Betts, 927 F.2d 983, 986 (7th Cir. 1991); United States v. Burstyn, 878 F.2d 1322, 1324 (11th Cir. 1989); United States v. Revie, 834 F.2d 1198, 1201 (5th Cir. 1987), cert. denied, 487 U.S. 1205 (1988); see also Common Cause, 674 F.2d at 927; United States v. Greyhound Corp., 508 F.2d 529, 537 (7th Cir. 1974).

In determining that the decree was clear and specific as applied to the MCI service bureau, therefore, the district court properly considered both objective and subjective evidence. The court's conclusion that the MCI service bureau "can only be construed as the provision of an information service," 814 F. Supp. at 136-39 (J.A. 247-53), is fully supported by the language and history of the decree and of the software waiver. It also is supported by the court's finding that "key NYNEX managers clearly knew that the MCI service bureau was an information service," for their knowledge "tends to prove the clarity of the decree." 814 F. Supp. at 139 (J.A. 254-55). See part II, C, infra.

The district court also found that "there is no contemporaneous evidence whatever that NYNEX believed the service to be CPE plus software." 814 F. Supp. at 137 (J.A. 247-48). Contrary to NYNEX's contention (Br. at 17), that is an accurate assessment of the record. NYNEX offered no contemporaneous memoranda or other documents indicating that any NYNEX official thought the MCI service bureau was permissible as CPE plus software. Hearity, Selig and Cunningham did not assert such a view in their depositions, and NYNEX counsel at those depositions (including Murray) did not elicit any testimony to that effect in cross-examination. Further, NYNEX's February 1987 letter, signed by Murray, responding to the Department of Justice's inquiry, conceded that the MCI service bureau at least arguably constituted an information service and did not contend that it was permissible as CPE plus software. GX 99 (J.A. 537). In short, NYNEX's "CPE plus software" argument is not only based on a "tortured reading . . . at odds with the purpose and history of the [decree]," Greyhound, 508 F.2d at 536, but also is an interpretation that NYNEX officials never relied on in providing the MCI service bureau.[14]

[14]Murray testified at trial that he had told Hearity, in April 1986, based on limited information, that "it sounded to me like what Telco Research was doing was providing a computer and that that was clearly CPE . . ." Tr. 345 (J.A. 183). But that uncorroborated testimony is entitled to little weight in light of the contemporaneous documentary and deposition evidence to the contrary. See, e.g., United States v. United States Gypsum Co., 333 U.S. 364, 396 (1948). The district court properly excluded Murray's testimony as to whether he thought that Hearity thought the MCI service bureau could be defended as "CPE plus software," see part III, B, infra, and such speculation, even if admitted, also would have been entitled to little weight.

The evidence on which NYNEX (Br. at 19-24) relies in contending that the decree was "profoundly ambiguous as applied to the MCI arrangement" because of an asserted "conflict" between the information services and CPE provisions does not support -- much less require -- the conclusions NYNEX seeks to draw. The Department's statement that "there is no clear or competitively rational dividing line between information services and CPE" was made, after the decree violation here at issue, in a lengthy 1987 report assessing whether there was a continuing competitive justification for the decree restrictions. DX 1028 (J.A. 631). The Department did not suggest that there was any ambiguity as to whether the decree prohibited the BOCs from offering remote access data processing services such as the MCI service bureau. To the contrary, the Department's analysis and its recommendation that the information services restriction be removed were premised on the undisputed view that the decree prohibited such services. See DX 1028 at 105 (J.A. 633).

Further, the statement in the 1987 telecommunications industry report that Peter Huber, an engineer and attorney, prepared for the Department -- that the decree "permits the BOCs to provide CPE" and "to market software that allows customers to provide their own information services," see NYNEX Br. at 21; DX 1027 at 6.10 n.23 (J.A. 629) -- pointed out a distinction that the Department did not question and that is critical in this case. The BOCs were allowed only to provide CPE and to provide software; they were not allowed to provide information services

in which CPE and software were used.[15] Finally, an observation that the information services prohibition may be unclear at the margins is not a concession that precludes prosecution of clearly prohibited conduct. Cf. United States v. Thomas, 864 F.2d at 198.[16]

Nor did the testimony at trial of Huber, called as a witness by NYNEX, require the court to find that the decree was unclear as applied to the MCI service bureau. The court, in its discretion, allowed Huber to testify as an expert on information services and related issues "from an engineering or economic perspective." Tr. 371 (J.A. 207). From that perspective, Huber indicated that the MCI service bureau had some features characteristic of what he would call an information service. Tr. 382-83 (J.A. 218-19). The court had no need for an "expert" on the clarity of the decree, and Huber recognized that "ultimately the legal definition isn't something I can really speak to." Tr. 371 (J.A.

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[15]Similarly, the Department's letters on automatic meter reading services, DX 1006 (J.A. 603); DX 1038 (J.A. 636); see NYNEX Br. at 24, emphasized that the BOCs could provide CPE and exchange services (including information access) but not information services.

[16]United States v. Critzer, 498 F.2d 1160 (4th Cir. 1974) (see NYNEX Br. at 18-19) involved a very different situation and does not support NYNEX's contention that the decree was unclear as applied to the MCI service bureau. In Critzer, the court of appeals reversed a conviction for willfully attempting to evade federal income taxes. The court found that any violation of the tax laws could not have been willful because the taxability of the income at issue was "so uncertain that co-ordinate branches of the United States Government plausibly reach directly opposing conclusions." 498 F.2d at 1162. The IRS claimed the income was taxable, but the government conceded that the Department of the Interior (as trustee for the Indian lands from which the income in question was derived) had formally advised defendant that the income at issue fell within a statutory exemption. In contrast, no government official ever advised NYNEX that the MCI service bureau was legal.

207). Further, Huber testified that NYNEX had not consulted him at the time it was providing the MCI service bureau, but: "I want to make this absolutely clear. If anybody had consulted me as a lawyer, I would have told NYNEX, `Do not touch this under any circumstances.'" Tr. 381-82 (J.A. 217-18).

C. NYNEX's Violation Was Willful

The district court correctly held that violation of a court order is willful if the defendant (1) knew or should have known its obligations under the decree, and (2) deliberately or recklessly violated the decree. 814 F. Supp. at 140 (J.A. 259); United States v. Brown, 454 F.2d 999, 1009 & n.53 (D.C. Cir. 1971); Sykes v. United States, 444 F.2d 928, 930 (D.C. Cir. 1971); Greyhound, 508 F.2d at 532. The evidence before the district court was more than sufficient to support its conclusion that NYNEX, through Hearity, Cunningham and Selig, willfully violated the decree.[17] Indeed, the district court found the evidence "overwhelming." 814 F. Supp. at 139 (J.A. 255).[18]

NYNEX's contention (Br. at 25) that the district court committed reversible error because it based the guilty verdict on the admissions of Hearity, Selig and Cunningham and "ignor[ed]" assertedly contradictory testimony from Gerald Murray, a senior NYNEX attorney, and deposition testimony of Arne Theodore

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[17]A corporation may be found guilty of contempt if only one of its officials willfully violates a court order. See Fox, 886 F.2d at 660-61.

[18]Willfulness for criminal contempt may, as in other areas of criminal law, be inferred from the facts and circumstances. Greyhound, 508 F.2d at 532; see also United States v. Baker, 641 F.2d 1311, 1317 (9th Cir. 1981); Goldfine v. United States, 268 F.2d 941, 945 (1st Cir. 1959), cert. denied, 363 U.S. 842 (1960).

Engkvist, the president of NYNEX's subsidiary DEVCO, is meritless. The court was permitted to weigh the evidence and assess the credibility of the witnesses, and there was no reason for it not to credit the admissions of the three NYNEX officials responsible for the decree violation and to disregard testimony of other NYNEX officials to the extent it was inconsistent.

Selig repeatedly admitted that he believed that the MCI service bureau violated the decree. Selig Dep. at 32-34, 50-51, 61, 73-74, 83-84, 121-23, 161-62, 176, 180-82[19] (J.A. 416-18, 419-20, 425, 426-27, 428-29, 431-33, 434-35, 439, 441-43).

Contrary to NYNEX's contention (Br. at 26), the evidence did not require the court to conclude that Selig had confused the MCI service bureau with another Telco information service, the "Tariff Library," that was terminated after NYNEX acquired Telco. Selig recognized that there were "two separate issues, one was the usage of the Tariff Library . . . and then the other piece of the issue was the MCI issue." Selig Dep. (Raf.) at 121-24 (J.A. 457-60) (on cross-examination by NYNEX counsel). As the district court pointed out, the two services are similar, and the similarity and Selig's knowledge that the Tariff Library was illegal tend to confirm his knowledge that the MCI service bureau also was illegal. 814 F. Supp. at 139 (J.A. 255-56). NYNEX quickly stopped offering the less profitable Tariff Library so as

[19] "Dep." refers to transcripts of depositions taken in the government's investigation; "Dep. (Raf.)" refers to depositions taken in Rafferty v. NYNEX, No. 87-1521 (D.D.C.). Except where otherwise indicated, all "Dep." cites are to transcripts admitted into evidence in this case. See 781 F. Supp. at 30 (J.A. 89-90); Memorandum and Order (April 29, 1992) (J.A. 226-32).

not to violate the decree, but it chose not to discontinue the MCI service bureau. Id.

The evidence also supported the district court's finding that "[b]oth Hearity and Cunningham also knew or should have known that the service bureau was an information service prohibited by the decree." 814 F. Supp. at 139 (J.A. 256). The court concluded that Cunningham knew that the MCI service bureau violated the decree because Cunningham repeatedly admitted that Hearity told him that it did and because Cunningham had so informed others. Cunningham Dep. at 113-15, 118-20, 139-44, 191 (J.A. 281-83, 286-88, 297-302, 313).[20] In addition, the court relied on Hearity's admissions that NYNEX's operation of the MCI service bureau was "sailing too close to the wind" and that "if Telco had been the owner, the undisputed owner of that computer" -- which he knew or should have known it was[21] -- then Telco would have been "providing an information service." Hearity Dep. at 147, 148, 151, 200-02 (J.A. 336, 337, 340, 349-51).

Contrary to NYNEX's contention (Br. at 27), Hearity's representation to Department of Justice attorney Michael Altschul

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[20]Contrary to NYNEX's suggestion (Br. at 26), the district court was entitled to believe Cunningham's admissions that he knew the MCI service bureau violated the decree, even though they were "in response to leading questions," and regardless of whether they were inconsistent with other statements in his depositions.

[21]While Hearity himself did not directly admit that he knew Telco owned the MicroVAX computer, his representation to Department of Justice attorney Altschul that the ownership would be transferred, Hearity Dep. at 235-36 (J.A. 369-70); Hearity Dep. (Raf.) at 53 (J.A. 408), his admission that Cunningham had told him "it appeared Telco still owned the computer," Hearity Dep. (Raf.) at 47, and Murray's testimony at trial, Tr. 344-45 (J.A. 402), support the conclusion that Hearity not only should have known but did know that Telco owned the computer equipment it used to provide the MCI service bureau.

that NYNEX was "in the process of transferring the computer to MCI," does not "decisively confirm" that the NYNEX employees who knew of the MCI service bureau "did not believe that it violated the MFJ, but wished to change it so as to eliminate any possible question." Hearity's own admissions (Atschul did not testify) permitted the court to conclude just the opposite: that NYNEX did believe the MCI service bureau was illegal but did not wish to change it. Nor was the evidence of NYNEX's willful violation negated by the fact that "Altschul expressed concern about the MCI arrangement but did not definitively advise Hearity that it constituted a prohibited information service or that the arrangement should be immediately terminated." 814 F. Supp. at 140 (J.A. 257-58). There was no evidence that Altschul suggested that the MCI service bureau was legal or even arguably legal in its current configuration; he expressed reservations about whether even the promised transfer of ownership without moving the computer off Telco premises would be sufficient to comply with the decree, id.; Hearity Dep. at 236-37 (J.A. 370-71); and Hearity never asked Altschul for his opinion as to whether the MCI service bureau without modification was legal. Hearity Dep. at 236-38 (J.A. 370-72). In any event, the absence of a formal warning from the Department would not excuse NYNEX's violation. See Greyhound, 508 F.2d at 534.

The court's finding that the decree violation was deliberate or reckless also is supported by the ample evidence that "[a]s early as the fall of 1985, NYNEX officials were aware that the MCI service bureau presented decree problems," but discussion of the violation "produced only delay, not a remedy." 814 F. Supp. at

141 (J.A. 260-61). As the district court correctly held, "willful intent constituting criminal contempt exists where corporate officials bearing an affirmative obligation remain inert," and "this case shows a pattern not only of inaction or an inadvertent oversight in the face of an affirmative obligation but of a conscious choice not to comply with the decree." 814 F. Supp. at 140 (J.A. 259-60) (citing In re Dolcin Corp., 247 F.2d 524, 534 (D.C. Cir. 1956), cert. denied, 353 U.S. 988 (1957)).

The evidence of NYNEX's conscious choice not to remedy the violation on which the district court specifically relied included NYNEX's "strong economic motives not to discontinue the MCI service bureau," numerous communications clearly showing that the MCI service bureau was continuing after the acquisition, and Hearity's, Selig's and Cunningham's failure to take any affirmative steps to bring about compliance with the decree. 814 F. Supp. at 140-41 (J.A. 260); see Cunningham Dep. at 112-15, 146-49, 185, 187-91 (J.A. 280-83, 303-06, 307, 309-13); Hearity Dep. 247, 277-82 (J.A. 381, 392-97); Selig Dep. 53-55, 162-63, 166-67, 186-87, 196-97 (J.A. 422-24, 435-36, 437-38, 444-45, 446-47); Tallent Dep. 111-13 (J.A. 464-66); GX 54 at 1-2 (J.A. 525-26); GX 56 at 1 (J.A. 528); GX 71 at 2-3 (J.A. 533-34); DX 35 (J.A. 543). Cunningham's "active maneuver[ing] to avoid ending the service bureau," was especially telling; the court found that he "was deliberately evasive" even with Hearity "in order to permit the MCI service bureau to continue operating." 814 F. Supp. at 141 (J.A. 261-62); see GX 56; Cunningham Dep. 104-11, 116-17, 121-22, 130-32 (J.A. 272-79, 284-85, 289-90, 291-93); Waterman Dep. 98-99, 101-02 (J.A. 470-71, 472-73).

Contrary to NYNEX's contention (Br. at 27-28), the court did not ignore testimony that Hearity and Selig had directed subordinates to modify the MCI service bureau to bring it into compliance. But the court found -- and NYNEX does not dispute -- that "the changes were not made, and, some ten months after the acquisition of Telco, the MCI service bureau continued to operate as before." 814 F. Supp. at 141 (J.A. 262). If NYNEX officials "did not learn" that Telco had not carried out their instructions "to modify the arrangement" (NYNEX Br. at 28) it was because they failed to carry out their own duty to make the necessary follow-up inquiries. The district court was correct in holding that "NYNEX cannot insulate itself from its responsibilities under the decree by creating a merry-go-round in which its employees continuously delegate decree responsibility." 814 F. Supp. at 141 (J.A. 262-63). NYNEX -- through these officials who "remained inert," deliberately or recklessly disregarded the decree, and made "a conscious choice not to comply" -- displayed the willful intent constituting criminal contempt, and NYNEX is liable for their conduct. 814 F. Supp. at 140-42 (J.A. 259-63).[22]

III. THE DISTRICT COURT DID NOT ERR IN ITS EVIDENTIARY RULINGS

[22]NYNEX's contention (Br. 28) that the district court "impose[d] absolute liability upon NYNEX for the . . . inaction of another corporation of which it has no knowledge" grossly misstates the basis for the district court's finding of guilt. Throughout the time period covered by the indictment, Telco was a wholly-owned subsidiary of NYNEX; thus NYNEX was providing the prohibited information service directly or through an affiliated enterprise. Further, the court based its finding of willful violation directly on the knowledge, intent and actions of NYNEX officials Hearity, Selig and Cunningham -- not on any secret Telco activities.

A trial court has broad discretion in deciding what evidence to admit, and evidentiary rulings are reviewed under an abuse of discretion standard. E.g., United States v. Payne, 805 F.2d 1062, 1067 (D.C. Cir. 1986); United States v. Lewis, 626 F.2d 940, 950-51 (D.C. Cir. 1980). Any evidentiary error that is harmless "shall be disregarded." Fed. R. Crim. P. 52(a); Fed. R. Evid. 103; United States v. Sutton, 801 F.2d 1346, 1370 (D.C. Cir. 1986). The court's discretion is especially broad in a nonjury trial. E.g., United States v. Hall, 969 F.2d 1102, 1109-10 (D.C. Cir. 1992); United States v. Foley, 871 F.2d 235 (1st Cir. 1989). Moreover, absent plain error that results in a miscarriage of justice, a party may not raise on appeal evidentiary arguments that it did not adequately raise and preserve in the district court. E.g., United States v. Young, 470 U.S. 1, 15-16 (1985); Sutton, 801 F.2d at 1367; see also

United States v. Olano, 113 S. Ct. 1770, 1776-79 (1993).

A. Admission of Rule 801(d)(2)(D) Statements from the Deposition Testimony of Hearity, Cunningham and Selig Did Not Violate the Confrontation Clause

Over NYNEX's objection, the district court admitted statements from the deposition testimony of NYNEX employees Hearity, Cunningham and Selig, offered by the government as admissions by a party-opponent under Fed. R. Evid. 801(d)(2)(D). Tr. 27-29 (J.A. 116-18). Rule 801(d)(2)(D) does not require that the declarant be unavailable, and NYNEX does not deny that the statements at issue conform to Rule 801(d)(2)(D) in that they are "statement[s] by the party's [NYNEX's] agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." NYNEX argues (Br. at 28-30), however, that because these admissions also constitute former testimony, the Confrontation Clause barred their admission. It is NYNEX and not the district court that has "misread the controlling Supreme Court cases" (see NYNEX Br. at 29).

Admission of out-of-court statements that fall within Rule 801(d)(2), regardless of whether the declarant is available as a witness, conforms to a well-established evidentiary rule and does not violate the Confrontation Clause. United States v. Inadi, 475 U.S. 387 (1986) (tape-recording of co-conspirator statement admitted under Rule 801(d)(2)(E)); United States v. Chappell, 698 F.2d 308, 312 (7th Cir.), cert. denied, 461 U.S. 931 (1983) (Rule

801(d)(2)(D)). A corporation makes statements only through its employees and agents, United States v. Dotterweich, 320 U.S. 277, 281 (1943), and the Confrontation Clause does not confer any right on a defendant to exclude its own prior out-of-court statements. See United States v. Southland Corp., 760 F.2d 1366, 1377 (2d Cir.), cert. denied, 474 U.S. 825 (1985) (corporation's Confrontation Clause objection to vicarious admissions overruled "since the witness it wishes to confront is, in the eyes of the law, itself").

Moreover, the admissions at issue here are especially reliable. Hearity, Selig and Cunningham had no incentive to misstate relevant facts or slant their deposition testimony to falsely suggest that, as NYNEX employees, they willfully violated the decree. They were still NYNEX employees at the time of their depositions, had not been granted immunity, and were personally subject to prosecution for contempt. See Southland, 760 F.2d at 1377. Moreover, these vicarious admissions were made under oath and with counsel for the corporation present. This makes them even less likely to be either intentionally false or carelessly wrong than more casual admissions. Finally, the admissions were contemporaneously and accurately recorded and a verbatim transcript prepared by a qualified and impartial court reporter. Such a transcript provides a far more accurate record of exactly what the declarant said than is available through the testimony of a witness who simply hears and repeats an 801(d)(2) admission.

The Supreme Court's decisions in Ohio v. Roberts, 448 U.S. 56 (1980); Inadi; and White v. Illinois, 112 S. Ct. 736 (1992), on which NYNEX relies (Br. at 29-30), in no way undercut the common-

sense conclusion that the reliable vicarious admissions at issue here were admissible without regard to witness availability. Inadi and White make clear that Roberts' unavailability requirement does not apply to all out-of-court statements. Inadi, 475 U.S. at 392; White, 112 S. Ct. at 741-42. Further, the Court's statement in White that "unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding," 112 S. Ct. at 741, explained why such analysis was not required for statements admissible under a hearsay exception other than that for prior testimony.[23] These cases neither hold nor suggest that the unavailability requirement that applies to statements offered only as prior testimony also applies to statements that are offered and otherwise admissible as party admissions. Not surprisingly, NYNEX cites no authority that supports such an absurd conclusion. Moreover, NYNEX's claim that it was denied its right to confront or cross-examine Hearity, Selig and Cunningham in this case is disingenuous. NYNEX counsel were present at these declarants' depositions and had ample opportunity to cross-examine them.[24] In addition, NYNEX easily could have called these declarants for

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[23]In White, the statements were admissible under hearsay exceptions for spontaneous declarations and statements made in the course of receiving medical treatment, which do not require that the declarant be unavailable.

[24]Some cross-examination testimony from the depositions was admitted into evidence. E.g., Cunningham Dep. (Raf.) 177-80 (offered by NYNEX); Selig Dep. (Raf.) 121-24 (offered by the government). Hearity, Selig and Cunningham did not testify before the grand jury, and NYNEX does not contend on appeal that the district court erred in admitting any other witnesses' testimony.

further cross-examination at trial. See Inadi, 475 U.S. at 387. Fed. R. Evid. 806 expressly provides that the party against whom a Rule 801(d)(2)(D) statement is admitted may call the declarant as a witness and "examine the declarant on the statement as if under cross-examination." NYNEX had ample notice that the government would offer the Rule 801(d)(2)(D) statements, see 781 F. Supp. at 30 (J.A. 89-90); Hearity, Selig and Cunningham were NYNEX employees, and NYNEX presumably could have compelled their appearance; and in a case tried to the court, prejudice resulting from the mere order in which witnesses appear, cf. Inadi, 475 U.S. at 407-11 (Marshall, J. dissenting), is inconceivable.

In these circumstances, NYNEX's decision not to call Hearity, Cunningham and Selig for cross-examination under Rule 806 makes clear that it was not really seeking to confront and cross-examine them, but rather to exclude reliable corporate admissions that supported the contempt charge. That it had no right to do.[25]

B. The District Court Properly Excluded Murray's Testimony as to Hearity's Out-of-Court Statements

The district court sustained the government's hearsay objections to testimony by NYNEX attorney Gerald Murray as to NYNEX attorney Tom Hearity's statements. Tr. 343-54 (J.A. 181-92). NYNEX

[25]If the United States had called Hearity, Cunningham and Selig to testify at trial, the substance of their deposition admissions could have come into evidence in one of two other ways, in addition to being admissible under 801(d)(2)(D). If Hearity, Cunningham and Selig had testified consistently with their deposition testimony, NYNEX would have had no valid objection to that courtroom testimony. Alternatively, if their trial testimony had been inconsistent with their deposition testimony or if their recollections had failed, the prior testimony would have been admissible not only for impeachment, but also for its truth under Fed. R. Evid. 801(d)(1).

claims (Br. 16-17, 33) that this was "clear error," "highly prejudicial," and entitles it to a new trial. NYNEX mischaracterizes both the court's rulings and its own offers of proof, and it fails to show any error, much less any clear and prejudicial error, in the court's ruling.

When NYNEX counsel asked Murray: "What did Mr. Hearity tell you at that time [April 1986] about the arrangement between MCI and Telco Research?," government counsel objected on grounds of hearsay. Tr. 343 (J.A. 181). NYNEX counsel argued that "the state of mind of Mr. Hearity is . . . an issue" because the government "charged . . . first, that he knew that the decree was clear and specific as applied to the facts here, and second, that he acted willfully." Tr. 343-44 (J.A. 181-82). NYNEX counsel argued further that "the belief or state of mind of a person, including Mr. Hearity, is not hearsay" and represented that he was "not offering these facts for the truth of Mr. Hearity's statements, but for the fact that he said them and for the fact of what this witness [Murray] then said to him." Tr. 343-44 (J.A. 181-82).

The district court initially ruled that: "I will let it in for the time being, but I may disregard it later. Since there is no jury, there is no harm in letting it in, although it doesn't sound admissible." Tr. 344 (J.A. 182). Murray then responded to a series of questions about what Hearity had told him about the MCI service bureau. He testified further:

> Well, I said to Tom, I said, Tom, it looked -- it sounded to me like what Telco Research was doing was providing a computer, and that that was clearly CPE under the decree; and it was providing it to a single customer, and that looked okay to me, why are you raising a problem.

Tr. 345 (J.A. 183).

When Murray continued: "He [Hearity] said, well, he --," however, the court sustained the hearsay objection, explaining that "it sounds to me like you are moving to have the testimony admitted for the truth of the matter and not simply for somebody's state of mind." Tr. 345 (J.A. 183). While NYNEX counsel again argued that he was offering the testimony "simply to establish that this was the witness's state of mind," the court determined that: "It obviously, with all those details, doesn't go to that." Id. The court subsequently sustained the government's hearsay objections to other attempts by Murray to testify as to Hearity's statements.[26] In sustaining the hearsay objections, the court expressly invited NYNEX to call Hearity, who was (and still is) a NYNEX employee, as a witness. Tr. 346 (J.A. 184) ("If you want to bring Mr. Hearity in, I will be glad to hear from him"); see also Tr. 348 (J.A. 186). But NYNEX counsel neither did so nor contended that Hearity was unavailable for any reason.

On appeal, NYNEX argues (Br. at 17) that "testimony offered to show state of mind is not excludable as hearsay," citing Fed. R. Evid. 801(c) and 803(3). Although NYNEX did not cite either of those rules in the district court, it appeared to be offering Murray's testimony as to Hearity's statements only under Rule 801(c), i.e., not for the truth of the statements. There is no

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[26]Tr. 347-48 (J.A. 185-86) (second conversation re Telco MCI service); Tr. 349-50 (J.A. 187-88) (early 1986 conversation re tariff library); Tr. 350-51 (J.A. 188-89) (January 1987 conversation about calling Department of Justice); Tr. 351-53 (J.A. 189-91); see also DX 53 (J.A. 547); DX 73 (NYNEX offer of proof from Murray deposition) (J.A. 553).

"evidentiary presumption of admissibility" that can be invoked "merely [by] fashion[ing] out of court statements as evidence of someone's thoughts," however, United States v. Heidecke, 900 F.2d 1155, 1163 (7th Cir. 1990), and a district court has considerable discretion in determining whether testimony is relevant for a nonhearsay purpose, e.g., United States v. Burrell, 963 F.2d 976, 998 (7th Cir.), cert. denied, 113 S. Ct. 357 (1992); United States v. Neely, 980 F.2d 1074, 1082 (7th Cir. 1992). If the proponent "seeks to have something more inferred from the content of the statement . . . than the mere fact that it was made," the statement is properly viewed as hearsay. United States v. Day, 591 F.2d 861, 881-82 (D.C. Cir. 1978). In this case, there was no abuse of discretion in the district court's conclusion that NYNEX was, in fact, attempting to offer "all those details" of Hearity's statements, Tr. 345 (J.A. 183), as Murray would have recounted them, for their truth.

NYNEX did not make any clear Rule 803(3) argument at trial, and therefore is barred from raising this ground for admission on appeal, absent plain error. Moreover, NYNEX has failed to show, even on appeal, that its offers of proof satisfied the requirements of Rule 803(3). Under that Rule, "a statement of . . . belief" is not admissible "to prove the fact . . . believed," and even according to NYNEX's offer of proof, Hearity's statements to Murray were not the kind of narrow, spontaneous statements of mental or emotional state (e.g., anger,

fear) commonly admitted under Rule 803(3). See United States v. Cohen, 631 F.2d 1223, 1225 (5th Cir. 1980).[27]

In any event, the court's exclusion of Murray's further testimony (as represented in NYNEX's offers of proof) even if erroneous, was not prejudicial. NYNEX did not offer any statements by Hearity that he believed the MCI service bureau was permissible under the decree because it was "CPE plus software" -- or for any other reason. NYNEX counsel did represent in the offer of proof that Murray would testify:

> Q. Did Mr. Hearity think that NYNEX could defend the status quo arrangement?
>
> A. I believe he did. Defend, in the sense that it was a provision by Telco Research of hardware called CPE, a computer, and the provision by Telco Research of software, both of which things are not prohibited and, in fact, affirmatively permitted by the MFJ and a waiver of the MFJ.

DX 73 (Murray Dep. at 114) (J.A. 567) (emphasis added). But Murray's speculative belief is not Hearity's statement and is not admissible under either Rule 801(c) or Rule 803(3). Further, Murray's speculation, well after the time of the decree violation, has little if any probative value. It is entirely uncorroborated by any documentary evidence and inconsistent with Hearity's own admissions. See p. 27-28, 33-34, supra.[28]

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[27]In addition, in order for a statement of belief to be admissible under Rule 803(3): (1) the statement must be contemporaneous with the mental state sought to be proven; (2) it must be shown that declarant had no time to reflect, that is, no time to fabricate or misrepresent his thoughts; and (3) the declarant's state of mind must be relevant to an issue in the case. United States v. Neely, 980 F.2d at 1083.

[28]NYNEX's other offers of proof were all essentially cumulative, and exclusion of cumulative testimony is not an abuse of discretion. See United States v. Wright, 783 F.2d 1091, 1099 (D.C. Cir. 1986). That "Hearity stated that this arrangement might be viewed as an information service because the computer (continued...)

Contrary to NYNEX's contention (Br. at 17), the court clearly ruled that Murray could testify about his own views and statements concerning the MCI service bureau, "if he can testify to something that isn't directly related to what Mr. Hearity said." Tr. 351 (J.A. 189). But NYNEX counsel did not seek to elicit such testimony from Murray.

IV. THE SECTION OF THE UNITED STATES DEPARTMENT OF JUSTICE ANTITRUST DIVISON RESPONSIBLE FOR INVESTIGATING AND PROSECUTING NYNEX'S CONTEMPT HAD NO DISABLING "CONFLICT"

NYNEX's argument (Br. 31-32) that its conviction should be reversed and the indictment dismissed because "prosecutorial decisions in this matter" were made by the same section of the Department of Justice Antitrust Division that is responsible for other matters arising under the AT&T decree is frivolous. Some of the attorneys who conducted and supervised the investigation and prosecution of this criminal contempt case also were involved in other investigations and judicial proceedings relating to the enforcement, construction and modification of this antitrust decree. But this was entirely proper. These attorneys had no personal or financial interest in any decree matter -- indeed, NYNEX does not contend that they did -- and no law, principle of

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[28](...continued)
was owned by Telco Research and was on the premises of Telco Research," Tr. 346 (J.A. 184), essentially duplicated Hearity's admission in his deposition. See Hearity Dep. 206-08 (J.A. 352-54). At Tr. 348 (J.A. 186), NYNEX counsel expressly informed the court that he was offering cumulative testimony. ("Mr. Hearity has already testified, under oath, in the deposition transcripts that are now in evidence to the same effect that I have stated.") Further testimony that Murray and Hearity concluded that the tariff library service "was an information service, and that the client should be told that it had to be stopped prior to the acquisition," Tr. 350 (J.A. 188), would not have aided NYNEX's defense since the court made no finding to the contrary. See 814 F. Supp. at 139 (J.A. 255-56).

legal ethics or Department of Justice regulation prohibits attorneys from participating in multiple related investigations or cases.[29] Moreover, any U.S. Attorney or other alternative Department of Justice prosecutors would be subject to the same control by the Attorney General as the Antitrust Division, but would be less well-suited in terms of expertise and efficient use of government resources to investigate and prosecute contempt of an important antitrust decree.

All Department of Justice attorneys are authorized by statute to conduct "any kind of legal proceeding, civil or criminal," that could be instituted by a United States Attorney, 28 U.S.C. §515(a); see also 28 U.S.C. §§ 516, 519. The Attorney General has assigned to the Assistant Attorney General for the Antitrust Division, responsibility for "[g]eneral enforcement, by criminal and civil proceedings, of the Federal antitrust laws," including "proceedings to enforce compliance with final judgments in antitrust suits and negotiation of consent judgments in civil actions." 28 C.F.R. §0.40.[30] In addition, Sections VI and VII of the AT&T decree grant the Antitrust Division extensive powers to enforce the decree and to apply to the district court "for the punishment of any violation" of it. 552 F. Supp. at 230, 231 (J.A. 478-79).

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[29]No government attorneys were witnesses for either side, and Michael Altschul, the Department attorney involved in the discussions with Hearity, see 814 F. Supp. at 140 (J.A. 257-58), did not participate in the trial.

[30]The Assistant Attorney General is authorized "to designate Department attorneys to conduct any legal proceedings, civil or criminal, including grand jury proceedings . . . which United States Attorneys are authorized by law to conduct." 28 C.F.R. §0.13(a).

As the district court correctly recognized in denying NYNEX's motion to dismiss the indictment on "conflict" grounds, see 781 F. Supp. at 30 (J.A. 88-89), the cases on which NYNEX relies do not support the contention that it was somehow improper for the Antitrust Division to prosecute this case. In Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987), the Supreme Court reversed a criminal contempt conviction prosecuted by an interested private party. FTC v. American Nat'l Cellular, 868 F.2d 315, 320 (9th Cir. 1989), and SEC v. Carter, 907 F.2d 484 (5th Cir. 1990), involved attorneys from regulatory agencies, who were not authorized by statute to conduct criminal prosecutions.[31] These cases neither hold nor suggest that any Division of the Department of Justice is barred from conducting criminal contempt prosecutions arising out of disobedience to orders entered in that Division's civil cases. To the contrary, they confirm the Department of Justice's criminal prosecution authority.

CONCLUSION

This Court should affirm the judgment of the district court.

In the event the Court concludes that the fine imposed in this case was unconstitutional absent a jury trial, the Court

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[31]In American Nat'l Cellular, the Ninth Circuit permitted Federal Trade Commission attorneys involved in a civil case to be appointed special prosecutors in a related criminal contempt proceeding over which the U.S. Attorney retained control. In Carter, the Fifth Circuit held that it was prejudicial error for a trial court to appoint Securities and Exchange Commission attorneys as special prosecutors in a criminal contempt matter where the SEC was the named plaintiff in the underlying civil case, and the Department of Justice had no role in the prosecution.

should affirm the conviction and modify the judgment by reducing the fine to the maximum amount that it concludes is constitutionally permissible.

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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 1993, two copies of the foregoing BRIEF FOR APPELLEE UNITED STATES OF AMERICA (final copy) were served on counsel for appellant:

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